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Supreme Court, U.S.
FILED
FEB 25 2003
OFFICE OF THE CLERK

No. 02-1065

In The

Supreme Court of the United States

STEVE MAY,

Petitioner,

v.

JANICE BREWER, as Secretary of State of the State of Arizona, acting in her official capacity; DAVID PETERSON, as Treasurer of the State of Arizona, acting in his official capacity; the CLEAN ELECTIONS COMMISSION; and ARIZONANS FOR CLEAN ELECTIONS,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of Arizona

REPLY BRIEF FOR PETITIONER

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ARGUMENT

Respondents' arguments go mainly to the legal dispute at issue in this case. As directed by this Court's rules, we will not re-argue the substance of our case. It is quite clear that petitioners and respondents have a different view of the applicable law, which has produced precisely the type of crisply delineated constitutional question that this Court is best equipped to resolve.

Respondents do not dispute that the case raises important constitutional or public policy issues relating to the growing propensity of states to subsidize political campaigns, either through general appropriations or, as here, special exactions. As we noted in our Petition (Pet. at 19), at least five other states already have done so. Those programs already have produced no fewer than five lawsuits, four of which raised First Amendment claims, two of which led to the invalidation of campaign subsidies and two of which upheld them. The conflict and confusion over the First Amendment issues reflects in the fact that the two appellate courts below, each in a unanimous decision, reached opposite conclusions as the result of applying this Court's different compelled speech frameworks in *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977) and its progeny on the one hand, and *Bd. of Regents v. Southworth*, 529 U.S. 217 (2000), on the other. Moreover, recently enacted federal campaign finance reform legislation calls for a study of campaign subsidy schemes in Arizona and elsewhere (Pet. at 20). Plainly the issues raised in this case are of nationwide importance; and just as plainly the proper time is now to resolve the conflicting legal approaches taken by lower courts.

Respondents err in their characterization of the main conflicting precedent, *State of Fla. by Butterworth v. Republican Party of Fla.*, 604 So.2d 477 (Fla. 1992), which struck down a campaign subsidy program financed by discrete groups of individuals. Respondents contend that the Florida Supreme Court's decision was grounded in the fact that the subsidies were exacted from political organizations. Although the court discussed that issue in passing, it did not base its holding on that factor, but rather on the fact that the connection between the subsidy and the individuals singled out to pay it flunked the germaneness inquiry that the Arizona Supreme Court rejected in this case. Indeed, the fact that the exactions were imposed on political parties could cut in the opposite direction, because such exactions at least arguably would be germane to political campaigns,[1] in contrast to exactions imposed upon people who incur civil or criminal fines. Ultimately, the Florida Supreme Court concluded that "the assessments impermissibly infringe on their First Amendment rights *by devoting the assessed funds to causes or candidates they do not support. . . .* " *Id.* at 479 (emphasis added). Applying *Abood* (in contrast to the Arizona Supreme Court below, which applied *Southworth*), the Florida Supreme Court reasoned as follows:

> Support from the trust fund is available on a content-neutral basis, but at least a portion of that money will be given to the appellees' adversaries, and in those cases the effect of the assessment will be to subsidize candidates with

[1] Some of the publicly funded campaign finance programs, for instance, derive income from candidate filing fees.

> political positions differing from those of the appellees. Although the infringement upon appellees' rights is not as substantial as it would be if the funds were allocated solely for partisan political purposes with which the appellees disagreed, even laws "restricting freedom of expression only incidentally . . . must be narrowly drawn to avoid unnecessary intrusion on freedom of expression."

Id. at 479-480 (citation omitted). The decision plainly applied the *Abood* germaneness test, and went beyond the *Southworth* inquiry of content neutrality that formed the basis for the Court's decision here. "While publicly funding candidates advances the interest put forth by the State and does not abridge First Amendment values" (citing *Buckley v. Valeo*, 424 U.S. 1 (1976)), "singling out political parties and associations to support the fund *bears no relationship to the interest advanced.*" *Id.* At 480.

Unlike *Buckley*, but like the case in *Butterworth*, here the costs of campaign subsidies are not voluntarily assumed or spread across the general population, but instead imposed upon a discrete group of individuals – precisely the circumstances, as the Florida Supreme Court found in *Butterworth*, that trigger this Court's strict scrutiny of compelled speech. Here, petitioner Steve May was singled out because he incurred a parking fine, not because he had some special relationship with the political system. As in *Butterworth*, inevitably some of the funds would flow to candidates with whom he disagrees – indeed, and perversely, including his own election opponents. For someone like May, in fact, who opposes involuntary or taxpayer-financed campaign subsidies altogether, *all* of the funds would flow to candidates with whom he disagreed.

Butterworth stands in irreconcilable conflict to the decision below. Even though the contours of the subsidies are different – as they would be in any two campaign subsidy schemes – the rule of law announced by the two decisions is starkly contradictory. *Butterworth*, as opposed to the decision below, rejects the notion that *Buckley* dictates the outcome in a case involving involuntary political subsidies as opposed to voluntary funds or funds derived from the entire tax base. Even more significant, *Butterworth* applies the *Abood* germaneness test while the court below rejects it. Either one test or the other applies in the context of involuntary campaign subsidies extracted from discrete groups, and the choice of test virtually dictates the outcome. Only this Court can resolve that conflict.

Respondents separate their position from *Butterworth* in one other vitally important way. Taking a remarkably extreme position – yet a necessary implication of their broader argument – the Arizonans for Clean Elections respondents (Opp. at 7) contend that involuntary political contributions do "not implicate the First Amendment" at all. See also Brewer Opp. at 16 (such contributions entail "no expressive conduct"). In contrast, the Florida Supreme Court opined that "supporting a political candidate financially is speech and represents political expression at the core of the electoral process." *Id.* at 479.

Were this Court to adopt respondents' view, it would mark a tremendous retrenchment of First Amendment principles. Indeed this Court recognized in *Buckley*, 424 U.S. at 14, that political contributions "operate in an area of the most fundamental First Amendment activities." "Certainly, the use of funds to support a political candidate is 'speech'." *Austin v. Mich. State Chamber of Commerce*,

494 U.S. 652, 656 (1991); accord, *Beaumont v. FEC*, 137 F. Supp.2d 648, 651 (E.D.N.C. 2000), *aff'd*, 278 F.3d 261 (4th Cir. 2002) ("the importance of campaign contributions and expenditures as political speech is beyond question"). And yet the Arizona Supreme Court decision embodies the cavalier disregard for First Amendment principles voiced by the respondents.

This case raises urgent issues of public importance. It magnifies a split in authority on important and difficult First Amendment questions. It does so in a manner hospitable to clear resolution by this Court. We respectfully urge this honorable Court to settle the conflict and reaffirm vital First Amendment protections.

Respectfully submitted,

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